BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	**CC Docket No. 96-98**
	)	

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REPLY COMMENTS OF SBC COMMUNICATIONS INC. RELATING TO DIALING PARITY, NUMBER ADMINISTRATION, NOTICE OF TECHNICAL CHANGES, AND ACCESS TO RIGHTS OF WAY

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SUMMARY*

The Telecommunications Act of 1996 was intended by Congress to foster competition and reduce regulation. Most of the Comments filed herein support this intent.

For example, the Comments show general agreement on the major issues of dialing parity. Most favor implementation of the "Two PIC" method, and most agree that a separate PIC for international calling is not needed. Almost all parties oppose balloting for selection of intraLATA carriers. Most agree that the Act requires LECs to offer to interconnecting carriers the same Operator Services and Directory Assistance that LECs offer their own customers. Most commenters agree that LECs should be allowed to recover the costs of dialing parity implementation, though some disagreement exists over which costs should be recovered.

SBC and virtually all other commenters agree with the Commission's tentative conclusion that the NANP Order satisfies the Act's requirements regarding CO code assignment. Several urge the Commission to implement the NANP Order expeditiously. Most commenters agree that Bellcore and the LECs should continue to perform the administration of telephone numbers pending transfer of those functions to the new NANPA; SBC, as well as other commenters, urges the Commission to take expedited action to transfer CO code administration to the new NANPA.

Almost all commenters agree that the current industry process for notification of technical changes works well and needs no Commission intervention. A few parties argue for a rather strong dose of federal control, but the Commission need not involve itself in this area.

All of the right-of-way Owner commenters agree that the Commission should also minimize

* All abbreviations used herein are referenced within the text.

federal regulations concerning nondiscriminatory access to rights-of-way. Since Owners and licensees can resolve most access issues via negotiated agreements, federal or state regulatory intervention is only necessary in the areas of disagreement. In particular, the Commission should not adopt federal mandates on subjects such as the meaning of "nondiscriminatory access," "insufficient capacity," or "pole, duct, conduit or right-of-way," reservation of capacity for future use, the manner and timing of notices of modifications or other onerous or unnecessary requirements suggested by certain commenters. Instead, all of the issues on these subjects can be adjudicated on a case-by-case basis via the Commission's pole attachment complaint process or a similar state proceeding. As provided in the existing Commission Rules, the party bringing a complaint concerning the terms and conditions of pole attachments should continue to bear the burden of proof of a *prima facie* case. While SBC opposes adoption of detailed regulations and interpretative rulings at this time, if the Commission chooses to interpret "nondiscriminatory access," it should not be construed to mean "unconditional access" or in a manner that ignores the constraints imposed by factors such as carrier-of-last-resort obligations, capacity, safety, reliability and engineering.

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REPLY COMMENTS OF SBC COMMUNICATIONS INC.
RELATING TO DIALING PARITY, NUMBER ADMINISTRATION,
NOTICE OF TECHNICAL CHANGES, AND ACCESS TO RIGHTS OF WAY

SBC Communications Inc. (SBC), by its Attorneys and on behalf of its subsidiaries, including Southwestern Bell Telephone Company (SWBT), Southwestern Bell Mobile Systems (SBMS), and Southwestern Bell Communications Services, Inc. (SBCS), files these Reply Comments in response to the comments that were filed on May 20, 1996.

As the Commission noted in the Notice of Proposed Rulemaking (NPRM) in this docket, the Telecommunications Act of 1996 (the Act) was enacted with the explicit purpose of fostering the development of "a pro-competitive, de-regulatory national policy framework" that would open "all telecommunications markets to competition." As set forth in SBC's Comments, as well as in scores of other comments, encouragement of the efficient and competitive functioning of the marketplace should be the Commission's goal in this proceeding.

I. DIALING PARITY

The Comments show general agreement on the major issues associated with dialing parity. Most favor implementation of the "Two PIC" (Primary Interexchange Carrier) method, and most agree that a separate (or third) PIC for international calling is not needed. Almost all parties oppose balloting for selection of intraLATA carriers. Most agree that the Act requires LECs to offer to interconnecting carriers the same Operator Services and Directory Assistance that LECs offer their own customers. Most commenters agree that LECs should be allowed to recover the costs of dialing parity implementation, though some commenters would circumscribe that recovery too narrowly.

A. <u>IntraLATA Toll Dialing Parity</u>

As SBC's Comments pointed out,[1] each end user should be allowed to choose either one or two carriers for intraLATA and interLATA toll calls--the "two PIC method." The subscriber can select the same or different service providers for each type of toll call (interLATA and intraLATA) without restriction. Implementation of intraLATA toll dialing parity should not force end users to change either intraLATA or interLATA providers.

Parties favoring the "two PIC" approach include AT&T,[2] US West[3] and Sprint.[4] The Telecommunications Resellers Association (TRA), on the other hand, suggests that the two PIC method should be implemented as an "interim measure" only, and that, "as soon as technically feasible," all LECs should be required to offer a "multi-PIC" or "smart-PIC" methodology, which TRA describes as follows:

> Under such a "multi-PIC" or "smart-PIC" system, customers should, at a minimum, be permitted to designate a different carrier as their preferred provider of intraLATA, interLATA and international traffic, but to the extent that further disaggregation is technically

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[1]SBC at 3.

[2]AT&T at 4.

[3]US West at 6.

[4]Sprint at 4.

> feasible, customers should be allowed to presubscribe to "niche" providers such portions of their traffic as they desire.[5]

A multi-PIC option is not commonly available in today's technology, nor will it likely be available at a reasonable cost any time soon. Even if technical and cost factors were not issues, the question would still arise whether the option of multiple PICs would be worth the confusion it would generate. Generally, consumers are unaware of the distinction between intraLATA and interLATA traffic. Allowing separate PICs for these two categories will, by itself, engender much confusion. If, in addition, separate PICs are required for "niche" carriers, then the permutations become almost endless, costs become excessive, and network management becomes almost insurmountably difficult. The Act does not require more than two PICs to achieve intraLATA toll dialing parity, and the Commission should hold to its tentative conclusion in the NPRM that the "two PIC" approach is consistent with the Act.[6]

B. Customer Notification

The Act does not require that customers be notified of options for choosing intraLATA toll providers. SBC's Comments suggested that all carriers should be responsible for soliciting their own customers and that the Commission should not require incumbent LECs to notify customers of carrier selection procedures.[7] There is general agreement on this point.

MCI, for example, states:

> End offices that have already been converted to interLATA equal access do not need to be balloted again for intraLATA presubscription. Instead, the industry should pursue a carrier marketing

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[5]Telecommunications Resellers at 4.

[6]Moreover, the Act also does not require a separate PIC for international calling.

[7]SBC at 4.

> approach to presubscription. In other words, carriers would use their marketing organizations to solicit individuals and businesses for presubscribed service.[8]

The most commonly discussed method of customer notification is balloting. Balloting of customers, for intraLATA toll traffic, however, is neither necessary nor functional. As the General Services Administration states, achieving competition in the intraLATA market will be much more complex and confusing than was the case when the interLATA market was opened at divestiture. Thus, methods such as balloting, which worked with interLATA equal access, would not work at all well in the intraLATA arena:

> In the present context, there is no comparable need to assign subscribers among a field of alternative providers. Furthermore, the field itself is much more varied and complex, with different providers offering different services covering different market areas. Balloting in this environment would be extraordinarily complicated. Ensuring its fairness among all providers would be a daunting task.[9]

The Act places great reliance on the market. In the case of customer notification, each carrier should be responsible for soliciting its own customers. Any other approach would not only generate confusion but would also be inconsistent with the intent of Congress.

C. Operator Services/Directory Assistance

SBC reiterates its support for the Commission's proposed definitions of nondiscriminatory access to operator services, directory assistance and directory listing. Telephone service customers, regardless of the identity of their local telephone service providers, must be able to connect to a local operator, access directory assistance, and obtain a white pages directory listing. SBC also agrees

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[8]MCI at 5-6.

[9]GSA at 6.

with most other parties in this Docket that ILECs should make these services available to all competitive providers (both facilities based and non-facilities based). The manner in which these services are provided, however, requires additional clarification.

AT&T suggests that "'nondiscriminatory access' should mean that customers are able to connect to a carrier's [emphasis added] operator services by dialing '0,' '0+ the telephone number,' or '00,' and not simply through '0' and '0+' protocols as the NPRM proposes."[10] AT&T also remarks: "While alternative dialing protocols (e.g., 1-900-555-1212) can be permitted for those carriers wishing to use them, no carrier should be required to use them."[11] These comments emphasize the need to discuss routing of operator services and directory assistance calls as well as the important distinctions which must be made between switch-based and non-switch-based competitive local service providers.

A facilities-based Local Service Provider (LSP) with its own switch can route operator services and directory assistance calls to its own operator services platform, or it may negotiate with an ILEC or another party to provide these services. SWBT, like many other parties commenting in this proceeding, will offer operator and directory assistance services under voluntarily negotiated agreements to a switch-based LSP upon request. Through such an arrangement, the LSP would establish a separate trunk group from its end-office switch to the SWBT operator services tandem.

Resellers of SWBT's local exchange services, or purchasers of SWBT's switched port and local switching unbundled network elements, will reach a SWBT local operator and have access to the same operator call completion services and directory assistance services available to SWBT

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[10] AT&T at 9.

[11] Id. at 10.

customers.[12] Other ILECs plan to offer access to operator services and directory assistance in practically the same manner.[13]

Some parties suggest that the definition of "non-discriminatory access to directory listing" be expanded to include access to yellow pages directories and "customer guide" sections.[14] The Act, however, only requires ILECs to provide non-discriminatory access to a white pages directory listing.[15] LSPs may negotiate separate agreements with directory publishers for other directory services.

The Commission should also be careful not to blur the distinctions between an ILEC's responsibilities to provide non-discriminatory access to a white pages directory listing under Section

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[12]As SBC has previously stated, the switch uses the Public Office Dialing Plan assigned to the line to connect to the proper facility for the digits dialed. Existing switch platforms are not designed to support assignment of unique Office Dial Plans or to support unique routing arrangements.

[13]NYNEX proposes a comparable arrangement, noting that "access to NYNEX's operator services is currently available to facilities-based telecommunications carriers under interconnection agreements. Under such agreements NYNEX provides access to its own operator services over NYNEX's common network facilities to interconnectors when they purchase NYNEX's port/switch unbundled network element, or when they interconnect to NYNEX's operator tandem from their own end office on a separate trunk group. Access to NYNEX's operator services is also available to non-facilities-based providers as part of the service they purchase from NYNEX for resale to their end users." NYNEX at 6.

[14]AT&T at ftnt. 14. Sprint proposes that "CLECs also should be allowed to insert informational pages containing their business and repair numbers in the ILEC's white and yellow pages directories at cost." Sprint at 10.

[15]Section 271(B)(viii).

271 and the responsibility to make Subscriber Listing Information available to independent publishers under Section 222.[16]

SBC reiterates its support for reciprocal agreements (between an ILEC and a switch-based competitive local service provider) for the provision of directory assistance. However, the provision of listings for directory assistance purposes is clearly distinct from the obligation to make Subscriber Listing Information available for directory publishing. ILECs should be permitted to continue negotiating distinct terms and conditions for the use of Subscriber Listing Information.[17]

AT&T suggests that SWBT, when reselling its operator services, should not apply the SWBT "brand."[18]

Federal law, however, requires all Operator Service Providers to "brand" at the beginning of each call.[19] The law does not allow a "no brand" option, as AT&T recommends, nor does the Commission have the authority to overrule the statutory requirement. SWBT will therefore continue to apply its "brand" to its resold operator services and directory assistance services.

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[16]MCI asks the Commission to

> ensure that each provider of local service has access to the directory listings of other providers, and that these directory listings are made available in readily usable format.
> By requiring the exchange of directory listings, the Commission will foster competition in the directory services market and foster new and enhanced services in the voice and electronic directory services market. MCI at 9.

[17]U S WEST states that

> one reasonable use restriction would be that directory assistance information (i.e., listings) be used only for directory assistance purposes and not for purposes of creating or publishing directories. U S WEST at ftnt. 25.

[18]AT&T at 9, ftnt. 12.

[19]47 U.S.C. §226(b)(1)(A).

D. Cost Recovery

Most commenters agree that LECs should be able to recover the costs of dialing parity implementation, but some would too narrowly circumscribe the allowable costs, while placing dialing parity into a straight jacket of intrusive regulation.

AT&T, for example, would have the Commission impose an approach similar to the "Equal Access Recovery Charge" on all providers of toll service, including all incumbent LECs, based on minutes of use. This charge, according to AT&T, would be tariffed on the state level as a rate element separate from access charges. Also, these dialing parity costs would be amortized over a period not to exceed eight years.[20] MCI suggests a similar approach. MCI would allow cost recovery only for incremental costs. Recovery of shared costs, according to MCI, should not be allowed. Moreover, the allowed costs would be paid only by intraLATA toll carriers. Incumbent LECs would thus end up paying the majority of dialing parity costs.

If the Commission is to implement the Congressional vision of a telecommunications industry unfettered by traditional regulation, then the proposals of AT&T, MCI and others must be rejected. These proposals are examples of regulatory micro-management, are inconsistent with Congressional intent, and would also--conveniently, from AT&T's and MCI's viewpoint--place the major burden of dialing parity cost recovery squarely the backs of incumbent LECs.

[20] AT&T at 7.

II. NUMBER ADMINISTRATION

A. Administration of Numbering

As stated in the NPRM,[21] the Act requires the Commission to "create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis "[22] SBC, as well as virtually all of the commenters in this docket, agreed with the Commission's tentative conclusion that the *NANP Order*[23] satisfies the requirements of the Act. A number of the commenters pointed out that the *NANP Order* has not yet been implemented since the North American Numbering Council (NANC) has not yet been announced; that group obviously must be constituted before it can proceed with the selection of the new North American Numbering Plan Administrator (NANPA).[24] Those commenters urged the Commission to implement the *NANP Order* expeditiously. Most commenters agreed that Bellcore and the LECs should continue to perform the administration of telephone numbers pending transfer of those functions to the new NANPA;[25] SBC, as well as other commenters, urges the Commission to take expedited action to transfer CO code administration to the new NANPA.

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[21]NPRM at ¶¶250-251

[22]47 U.S.C. §251(e)(1).

[23]*Administration of the North American Numbering Plan*, CC Docket No. 92-237, Report and Order, FCC 95-283 (rel. July 13, 1995), *recon. pending*.

[24]*See, e.g.*, AT&T at 11 CTIA at 3-5; GTE at 29-30; MFS at 7; Omnipoint at 3-6; PageNet at 2-4; TCG at 2-4.

[25]PacTel and the California PUC pointed out that the California PUC has agreed to act as central office code number administrator pending the appointment of the NANPA. SBC does not oppose this type of interim transfer of number administration responsibilities if such a move is deemed to be in the public interest.

B. Area Code Assignment

Most commenters, including SBC, agreed with the Commission's tentative conclusion that it "should retain its authority to set policy with respect to all facets of numbering administration," but that it should "delegate matters involving the implementation of new area codes, such as the determination of area code boundaries, to the state commissions so long as they act consistently with our numbering administration guidelines."[26] Those parties emphasized that state commissions should implement area code assignment in accordance with the Commission's *Ameritech Order*.[27]

A few commenters urged the Commission to adopt standards for area code assignment that are stricter than the guidelines set out in the *Ameritech Order*. Some parties urged the Commission to prohibit area code overlays altogether.[28] Other parties suggested that the Commission establish standards for the state commissions to follow, such as specific circumstances that must exist before an overlay plan can be implemented.[29] SBC disagrees with these suggestions. State Commissions should be given the latitude to choose an all-services overlay if they believe that the circumstances support such a decision. State Commissions should not mandate that a geographical split is always

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[26]NPRM at ¶¶254, 256 *See, e.g.*, AT&T at 11-12; CTIA at 5-7; Time Warner at 18-20.

[27]*Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech -- Illinois*, Declaratory Ruling and Order, 10 FCC Rcd 4596 (1995), *recon. pending*. In that Order, the Commission found that Ameritech's wireless-only overlay plan would be unreasonably discriminatory and anticompetitive and that administration of numbers: (1) must seek to facilitate entry into the communications marketplace by making numbering resources available on an efficient, timely basis to communications services providers; (2) should not unduly favor or disadvantage any particular industry segment or group of consumers; and (3) should not unduly favor one technology over another.

[28]*See, e.g.*, Cox at 3-6 (arguing that overlays should be prohibited until permanent number portability is implemented); NCTA at 9-10; TCG at 4-7.

[29]*See, e.g.*, MCI at 11-14.

the best solution for resolving NPA exhausts; rather the circumstances surrounding the exhaust should determine whether a split or an overlay is the best solution.

SBC agrees with those commenters who support delegation of limited authority regarding the type of code relief to be implemented (i.e., split or overlay) to state commissions, under the guidelines established by the *Ameritech Order*. However, the FCC would still have authority under the Act to preempt state area code assignment plans that are not in the public interest.

III. NOTICE OF TECHNICAL CHANGES

As SBC's Comments pointed out, industry guidelines for notification of technical changes already exist in RECOMMENDED NOTIFICATION PROCEDURES TO INDUSTRY FOR CHANGES IN ACCESS NETWORK ARCHITECTURE, ICCF 92-0726-004, revision date January 5, 1996.[30] The guidelines are issued by the Industry Carriers Compatibility Forum; they set forth notification procedures followed by the industry for numerous issues. All new service providers should be required to adhere to the guidelines, but such providers may also participate in crafting the guidelines. This industry procedure works well, and there is no need for the Commission to intervene.

Nevertheless, several commenters argue for an astonishing degree of federal control. For example, MFS argues that an incumbent LEC should be required to provide notice of network changes by certified mail to any telecommunications carrier with whom the incumbent has entered into an interconnection agreement.[31] MFS also suggests that:

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[30]SWBT at 14.

[31]MFS at 14.

> The Commission should establish a procedure for temporarily blocking any proposed network change until the Commission has time to investigate any alleged violations with respect to either the provision of notice or the nature of the network change. MFS suggests a rule that authorizes the Commission for good cause to issue an order, without prior notice or hearing, requiring an ILEC to cease and desist from making any specified changes for a period of up to 60 days."[32]

Here is a proposal strikingly out of step with Congressional intent. Not only would MFS have every network change become the subject of regulatory scrutiny, MFS would also suspend due process to further the goal of ensuring that no one will do anything, anywhere, that MFS might question. It is doubtful that MFS would be willing to adopt the same notification procedures for its own network changes.

Simply put, the Commission need not regulate this area because the industry process already works fairly and well.

IV. ACCESS TO RIGHTS-OF-WAY

The comments filed by right-of-way owners ("Owners")[33] and state regulators reflect general agreement that the Commission need not impose detailed federal directives and interpretations of the new access provisions of the Pole Attachment Act.[34] Instead of placing onerous national restrictions on top of the Act's new requirements, the Commission should implement the right-of-way requirements by defering to privately negotiated agreements, and, if necessary, adjudication of

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[32] Id. at 16.

[33] "Owner," as used herein, has the same meaning as "utility" in the Pole Attachment Act, 47 U.S.C. §224, i.e., it includes LECs as well as other public utilities that own or control poles, ducts, conduit or right-of-way.

[34] 47 U.S.C. § 224.

disputes. SBC opposes the numerous regulations and advisory rulings sought by interexchange carriers and competitive access providers ("CAPs") in their comments.

A. Detailed rules are not necessary.

A number of the Owner commenters observe that it is not necessary for the Commission to adopt detailed rules to govern the provision of nondiscriminatory access to right-of-way.[35] Instead, private negotiations between the Owners and licensees should be relied upon as the primary mechanism for providing nondiscriminatory access. If, and to the extent that, the parties are unable to reach an agreement on certain issues, the Owner commenters recognize the sufficiency of the state and Commission complaint procedures to resolve fact-specific disputes on a case-by-case basis.[36] As some of the commenters explain, no single set of rules could cover all of the possible right-of-way situations that may arise, especially given differences such as state property law.[37] Following the suggestions of the various Owner commenters, the Commission should not adopt detailed rules as to the conditions that would justify restrictions on access; the types of facilities and rights-of-way required to be made available; what should be considered insufficient capacity; and procedures regarding the manner and timing of notices under Section 224(h). Instead, all of these issues should be left to private negotiations between the parties based on standard nondiscriminatory

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[35]GTE at 24-26; Pactel at 17-22; Rural Telephone Coalition at 12-15; USTA at 9-11; Western Alliance at 4; Delmarva Power & Light et al. at 3-4; New England Electric System at 14-15; Puget Sound Power & Light at 2-3; Virginia Electric & Power at 13.

[36]BellSouth at 17; GTE at 25-26; Pactel at 17-18; New England Electric System at 14-15; UTC/Edison Electric Institute at 6-10.

[37]See, e.g., American Electric Power Service Corp., et al. at 19-20, 23-24, 32; Duquesne Light Company at i; 7, 11-12; GTE at 25; PacTel at 18, 22-23; UTC/Edison Electric Institute at 3-4.

utility agreements. In the event parties are unable to reach agreement on a particular statutory requirement, then the complaint process, at the state and Commission level, should suffice.

Just as Section 252 of the Act contemplates a voluntary, private negotiation process to implement the interconnection provisions,[38] Section 224, the Pole Attachment Act, as amended by 1996 Act, also contemplates voluntary negotiation. Specifically, Section 224(e)(1) requires the Commission to adopt rules governing the pole attachment rate to be paid by carriers, but those rules only apply "when the parties fail to resolve a dispute over such charges." Also, it is significant that Section 224 only calls for regulations governing rates, and does not require the Commission to adopt rules governing nondiscriminatory access, notice of modifications or any of the other new requirements of the Pole Attachment Act. As the regulations adopted for purposes of Section 224 will affect both LECs and electric utilities, reliance on Section 251 as the basis for adopting such regulations is misplaced; any Congressional intent to adopt regulations applicable to all right-of-way Owners should have appeared in the amendments to Section 224.

The LECs, electric utilities and state regulators generally comment against adoption of detailed rules concerning nondiscriminatory access and allocation of capacity; while CAPs and interexchange carriers urge the Commission to adopt regulations for every aspect of pole attachments[39] in excruciating detail. If the Commission acquiesces at all to these pro-regulatory demands, the Commission should also heed those commenters who point out the potential pitfalls

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[38]See Comments of SBC, CC Docket No. 96-98, filed May 16, 1996, at 5-10, 19-21, 64-66, 98-99.

[39]"Pole attachment," as used herein refers to attachments to a pole, duct, conduit or right-of-way.

of regulations that are too detailed based on too little experience.[40] In the words of an electric utility commentor, "limiting the rulemaking effort . . . to the establishment of procedures for resolving disputes when and if they arise would clearly be the most productive approach at this time."[41] Virginia Electric and Power Company explained very well why the Commission should limit its rulemaking due to the Commission's inexperience with certain technical and engineering standards, as well as the inadequacy of codes to address all conceivable situations. Virginia Power focuses on existing codes that establish safety standards but which are not "all-inclusive or definitive on all points."[42] SBC concurs with Virginia Power's conclusion that if the Commission believes that it must adopt rules concerning nondiscriminatory access, it should only adopt broad, flexible guidelines, such as the "Prudent Pole Attachment Practice" set forth in Virginia Power's comments.[43]

B. The Commission should not adopt rules not required by the Act.

The Act does not reflect any intention for the Commission to adopt detailed rules and interpretations of the Act's pole attachment provisions, as suggested by some commenters. Nor does the Act contemplate that the Commission would add to these obligations with respect to pole attachments. Instead, the Act contemplates that the parties will work out these issues on their own, if possible, and if not, then they will ask the state or federal regulator to assist them in determining their respective obligations. What some commenters suggest is that the Commission effectively

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[40]Delmarva Power & Light at 3-4.

[41]Puget Sound Power & Light Company at 2-3.

[42]Virginia Electric & Power Company at 13.

[43]Id. at 14.

preempt the private negotiation process by adopting "legislative" rules to interpret every aspect of the pole attachment provisions and, in addition, apply that interpretation to various circumstances the Commission might attempt to predict.[44] The Commission should not skip to the last step of the process contemplated by the Act; instead, it should use an adjudicatory process to resolve disputes as they arise.[45] This will be a much more efficient use of the Commission's resources, given that the parties have strong incentives to reach voluntary agreements.

In the sections that follow, while maintaining that specific rules should not be adopted, SBC responds to specific rules proposed by CAPs, interexchange carriers and cable operators. SBC does not profess to know, in several cases, exactly what was the intent of Congress. However, SBC does know that certain positions taken by the commenters are contrary to either common sense or the statutory language. In SBC's view, if the parties are unable to resolve these disputes in the context

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[44]Use of a legislative, rather than an adjudicatory, approach to pole attachments would not avoid or simplify the resolution of disputes. Instead, detailed regulations will only shift the focus of disputes from the statutory terms to the terms in the regulations. GTE at 23.

[45]In adopting rules under the Pole Attachment Act, the Commission adopted an approach similar to that which SBC and a number of other commenters have proposed here. In response to suggestions that the Commission adopt substantive guidelines concerning terms and conditions of pole attachment agreements, the Commission stated as follows:

> We adopt herein few substantive guidelines with respect to non-rate related terms and conditions of pole attachment agreements. Instead, we believe that we should initially respond on a case-by-case basis to complaints containing such issues with a view toward adopting appropriate substantive guidelines after we have obtained more experience in the area.

Adoption of Rules For The Regulation of Cable Television Pole Attachments, CC Docket No. 78-144, First Report and Order. 68 F.C.C. 2d 1585, 1590 ¶13 (1978) (footnotes omitted). The Commission has adhered to this approach to regulation of non-rate related terms and conditions throughout the history of its enforcement of the Pole Attachment Act.

of private negotiations, then the issue of Congressional intent ultimately may need to be resolved by the Commission or the judicial branch.

1. The Meaning of "Nondiscriminatory Access"

In this area as in most others, the Commission should proceed by adjudication rather than rulemaking. If an Owner denies access, the Commission can decide whether that utility has provided "nondiscriminatory access." In so doing, the Commission will not need to consider all of the possible reasons for denying access, nor will it have to consider various interpretations of the statutory terms; rather, it will be able to focus on the specific reason for that Owner's denial of access compared to that Owner's treatment of other carriers that had previously sought access.

The Commission sought comment as to the meaning of "nondiscriminatory access" and suggested by one of its questions that this might mean that the terms offered to other carriers had to "be the same as the carrier applies to itself or an affiliate for similar uses."[46] Several commenters concurred with the Commission's suggested interpretation of "nondiscriminatory access."[47] However, none of the commenters espousing this interpretation provide persuasive evidence of Congressional intent. Instead, they rely on arguments such as the "essential" nature of utility pole attachments.[48] However, these arguments would also be consistent with a conclusion that "nondiscriminatory access" merely means that the access provided must not discriminate between

[46]NPRM, ¶222.

[47]See, e.g., AT&T at 15; Citizens Utilities Company at 3; General Communication, Inc. at 3; MCI at 21; Sprint at 16; Time Warner at 13.

[48]MCI at 22.

the parties entitled to access. As one commentor pointed out,[49] Section 251(c)(2) contains a duty to provide interconnection with the LEC network "that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection . . . ."[50] Given that Congress knew how to make this sort of obligation explicit, the fact that it did not do so in this manner in Section 224(f) indicates that it does not have the same meaning. However, it is not necessary or appropriate for the Commission to decide at this time what Congress might have intended. Instead, it should decide this issue only when faced with a specific set of facts presenting the issue in the context of a genuine case or controversy.

While it is not necessary to resolve this issue at this time, it is SWBT's position that the interpretation sought primarily by the interexchange carriers would not be in the public interest because it would amount to a determination that the Owner's right-of-way has been expropriated in its entirety and become a national resource merely managed by the Owner.[51] The Act does not express an intention of divesting Owners of their rights-of-way or any other asset. In addition, such an interpretation is inconsistent with LECs' obligations as "carriers of last resort." It would be unreasonable to elevate the rights of those seeking pole attachments to the same level as the owner's rights, especially if in doing so, the Commission jeopardized the Owner's ability to perform its

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[49]Ameritech at 34.

[50]47 U.S.C. § 251(c)(2) (emphasis added).

[51]See Continental Cablevision et al. at 7 ("Poles represent social resources established as a public trust.")

public service obligation to its customers at reasonable rates.[52] As some commenters observed, implementation of this interpretation would constitute a "taking" without just compensation in violation of the Taking's Clause.[53]

2. Insufficient Capacity

Another area in which interexchange carriers and CAPs suggest detailed regulations relates to standards for determining when an Owner has "insufficient capacity" to permit access. SBC opposes adoption of any standards concerning allocation of capacity. However, if the Commission concludes that it must adopt some standards, these should be broad, flexible guidelines such as the ones suggested in SBC's Comments.[54] Other Owners also recommend general standards using different terminology, but their recommendations are generally consistent with SBC's Comments.[55]

Echoing the LECs' service-related concerns, the electric utility commenters generally express a need to reserve space for their own use to meet present and future demand and to continue providing reliable service.[56] The LEC commenters recognize other constraints on capacity, including municipal franchise requirements and the need in the case of conduit and ducts for an emergency/maintenance spare.[57] In contrast, the interexchange carriers request imposition of a

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[52]See Virginia Electric & Power Company at 9-10.

[53]GTE at 23-24.

[54]SWBT at 18-19.

[55]See, e.g., Bell Atlantic at 13; BellSouth at 15-16; Delmarva Power & Light at 13-14; GTE at 25-26; New England Electric System at 14-15; NYNEX at 11-12; Virginia Electric & Power Company at 7-9; Western Alliance at 4.

[56]See, e.g., Delmarva Power & Light at 12-14; Virginia Electric & Power Company at 7-9.

[57]Bell Atlantic at 13; BellSouth at 15-16; NYNEX at 14.

variety of inflexible standards and procedures to be used in determining whether there is insufficient capacity. Some of these commenters suggest that the Owner should not be allowed to reserve any space whatsoever for future use.[58] Significantly, however, some of the interexchange carriers who have experience in facilities planning, recognize that Owners must set aside some capacity to be used for facilities that the utility plans to construct to meet anticipated increases in demand or provision of additional services.[59] However, even these interexchange carrier commenters propose severe restrictions on the Owners' facilities planning. For example, AT&T suggests that the Owner would only be able to set aside capacity for the "immediately foreseeable future use -- for example, within one year or less."[60] Adoption of such restrictive guidelines for allocation of capacity would amount to an attempt to exercise excessive control over the Owner's internal business planning. In the context of the pro-competitive, deregulatory 1996 Act, it would not make sense for the Commission to micro-manage outside plant construction by LECs and electric utilities. The results could also be extremely harsh and disruptive. Forced to give up all of their capacity -- not merely that which is in excess of the forecasted requirements -- the Owner would be required to undertake additional construction to satisfy its own service obligations much sooner than it would otherwise. It would indeed be contrary to the Act to require, in effect, that LECs construct their competitor's facilities. Rather than procompetitive, such a regulation would be anticompetitive.[61]

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[58]American Communications Services, Inc. at 6-8; General Communication, Inc. at 3; GST Telecom at 6.

[59]See, e.g., AT&T at 16.

[60]AT&T at 16.

[61]Cf. In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, 10 FCC Rcd 10666 (1995) (weighing competitive (continued...)

Similarly out of line are the suggestions that the obligation to provide access to rights-of-way would also include the obligation to undertake additional construction to create new capacity. If Congress had intended the Owners to become "common carriers" of right-of-way facilities construction services, one would certainly expect them to expressly describe such an unusual obligation. The intent of the right-of-way access requirement of the Act is to give competing carriers access to the right-of-way facilities owned or controlled by the LECs and electric utilities, not to give competing carriers control over the Owners' construction plans and schedules, decisions concerning maintenance and replacement of facilities and other Owners' decisions as to how to manage their right-of-way assets. Thus, the Commission should reject suggestions such as those of the interexchange carriers and CAPs that claim that Owners must create capacity if none is available.[62]

Commenters also suggest additional onerous rules, such as rigid response times for providing access. Uniform, standard response times are not realistic given the wide diversity of the Owners' operations and staffing levels. In order to meet the unrealistically short deadlines suggested by some commenters, Owners would be required to dramatically increase their staffing levels without knowing whether there would be ongoing, consistent need for the additional resources required to meet such short deadlines.[63] Also, even if an Owner increased its staffing levels, this would not guarantee that it could meet the short deadlines in all cases. For example, an Owner might receive

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(...continued)
effect of rule that allows cellular carriers to deny resale to a facilities-based competitor).

[62]AT&T at 16-18; GST Telecom at 5; MCI at 23; Nextlink at 6.

[63]It is interesting that some of the commenters whose demands would require increased staffing also seek to limit the Owners' pole attachment fees. See AT&T at 21; MCI at 23-24; GST Telecom at 6, 10.